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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE GOOGLE PLAY STORE ANTITRUST LITIGATION

This Document Relates To:

Match Group, LLC et al. v. Google LLC et al., Case No. 3:22-cv-02746-JD

Epic Games Inc. v. Google LLC et al., Case No. 3:20-cv-05671-JD

Case No. 3:21-md-02981-JD

MDL No. 2891

DEFENDANTS' OPPOSITION TO EPIC'S AND MATCH'S MOTION TO AMEND COMPLAINTS

Judge: Hon. James Donato
Date: November 17, 2022
Time: 10:00 a.m. Pacific Time

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I. INTRODUCTION

Having reached the very end of nearly two years of discovery, with no evidence of harm to competition, Epic and Match ("Plaintiffs") now seek to transform the case. Under the guise of merely "conforming their pleadings," Plaintiffs are attempting to introduce a fundamentally new theory of liability *after* the close of fact discovery and *ten months after* the deadline to amend the pleadings. Not only is this effort far too late, it also seriously prejudices Google by depriving it of the ability to take discovery demonstrating that Plaintiffs' new theory is baseless.

The initiative on which Plaintiffs base their proposed new claims—formerly known within Google as "Project Hug"—provides incentives for game developers to make their products and services available on the Google Play store. It does not prohibit these game developers from creating competing app stores, as Epic and Match allege. Rather, these agreements reflect a competitive effort by Google to provide more value to key customers in order to win their business and, in turn, enhance the value of the Play store for users.

Project Hug is nothing new to Plaintiffs. Epic's and Match's existing complaints already allege that Google violated Section 2 of the Sherman Act by maintaining a supposed monopoly through a variety of conduct, including "Project Hug," an initiative to "throw extra love/promotion to top developers and games" to "prevent these developers from competing with Google Play." MDL Dkt. 64 ("Epic FAC") ¶ 128. Indeed, in August *2021*, Epic's CEO tweeted that, through Project Hug, Google was "pay[ing] off publishers to not compete with Google Play." Declaration of Glenn. D. Pomerantz ("Pomerantz Decl."), Ex. A.

Despite knowing about Project Hug for well over a year—and despite publicly complaining that Project Hug involved Google paying top developers not to compete—Plaintiffs strategically chose to litigate Project Hug only as part of their Section 2 monopolization claims. That claim, like any Section 2 claim, will be resolved under the rule of reason: Plaintiffs have the burden of proving anticompetitive effects, and Google will have the opportunity to present procompetitive justifications. But now Epic and Match seek to add a new theory that Google's Project Hug agreements violated Section 1 of the Sherman Act, including as a *per se* matter. By doing so, Plaintiffs are attempting, at the last moment, to dispense with the need to show

anticompetitive effects or address procompetitive justifications. More importantly, Plaintiffs' gambit tries to shift the litigation battleground—after the close of discovery—to a new and very different question: whether there is evidence of a tacit agreement not to compete. The Court should reject this effort and deny the motion.

First, this motion comes far too late, more than 10 months after the December 3, 2021, amendment deadline. Plaintiffs have been aware of this theory and the underlying facts that purportedly support it for many months, including as far back as July 2021, when Epic filed its First Amended Complaint ("FAC"). Plaintiffs cannot carry their burden under Fed. R. Civ. P. 16 to demonstrate that they were diligent in seeking amendment when they simultaneously contend that they put Google on notice of the underlying facts that they could have used to assert this theory many months ago. Mot. to Amend ("Mot.") at 1:12-14; 2:21-22; 3:12-14. The motion can and should be denied on that basis alone.

Second, permitting amendment at this late stage would severely prejudice Google. As noted above, Plaintiffs' new claims would shift the key issues in dispute from the competitive *effects* of the Project Hug efforts to a very different question: whether Google entered tacit agreements not to compete. And that question will need to be answered at least *two dozen* times, as Plaintiffs allege unlawful agreements between Google and "at least" that many app developers. The focus of discovery on that new sweeping theory would be whether there is evidence of a horizontal agreement not to compete, including *who* agreed to *what* and *when*, and *why* developers' decisions were unilateral and independent. Yet Google had no reason to seek discovery into those details, nor any reason to suspect that it would need to pull in each of the Project Hug developers into depositions to confirm the fact that there was *never an agreement* not to compete. Permitting amendment would deprive Google of the right to take this discovery.

Third, at least as to Plaintiffs' *per se* theory, amendment would also be futile. The proposed amended complaints do not come close to pleading an actual horizontal agreement not to compete, which must involve a meeting of the minds between Google and potential app store competitors. Even if such an agreement were sufficiently alleged here, it is not appropriate for *per se* treatment as a matter of clear antitrust law. At most, the complaints allege hybrid

agreements (i.e., having vertical and horizontal components) with Google's customers, which are analyzed under the rule of reason, and *per se* treatment is inappropriate for novel business practices and technology markets in any event. These new claims are therefore facially invalid.

II. BACKGROUND

A. Relevant Procedural History

Epic's initial complaint alleged that Google violated Section 2 of the Sherman Act through a mélange of conduct and restrictive agreements targeted at mobile device manufacturers, smartphone users, and app developers. Epic Dkt. 1 ¶¶ 135-57 (Aug. 13, 2020).[1] In support of this claims, Epic described its "belie[f]" that Google was striking deals with certain developers "to keep its monopolistic behavior publicly unchallenged," *id.* ¶ 30, yet Epic did not assert any Section 1 claim based on that allegation.

Later, in its July 21, 2021, amended complaint, Epic alleged that, through Project Hug, Google would "spend hundreds of millions of dollars on secret deals with over 20 top developers . . . in order to prevent these developers from competing with Google Play[.]" MDL Dkt. 64, ¶ 128. Epic quoted a Google document that allegedly suggested "several" of the developers "had 'considered their own distribution and/or payments platforms.'" *Id.* As in its initial complaint, Epic made these allegations in service of its monopoly maintenance claim—it did not assert a Section 1 claim arising out of such alleged agreements, and it did not allege that the agreements, or any aspects of them, were *per se* unlawful.

Shortly thereafter, on October 22, 2021, the Court entered a scheduling order setting December 3, 2021, as the deadline to amend. MDL Dkt.122.

Then, on April 28, 2022, Epic addressed Project Hug again in its preliminary injunction motion. MDL Dkt.213. Epic argued that Google was "paying off top app developers to stop them from developing and launching competing Android app stores," relying on testimony that had been taken many months earlier, and specifically citing a deal with developer Activision as

[1] "Epic Dkt." refers to the docket for *Epic Games Inc. v. Google LLC*, Case No. 3:20-cv-05671-JD. "Match Dkt." refers to the docket for *Match Group, LLC v. Google LLC*, Case No. 3:22-cv-02746-JD. "MDL Dkt." refers to the docket for *In re Google Play Store Antitrust Litigation*, Case No. 3:21-md-02981-JD.

"illustrative" of this initiative. *Id.* at 9-10. Epic described this initiative as Google's effort to "unlawfully protect[] its monopoly," *id.* at 9, opting not to assert a Section 1 claim.

Meanwhile, as Epic and other plaintiffs pressed their monopolization claims in court, and despite the fact that it was fully aware of this litigation and its effect on Match, Match chose to sit on the sidelines of the litigation.[2] *See* Pomerantz Decl. Ex. B. When Match did eventually file its complaint on May 9, 2022, Match Dkt.1 ("Match Compl."), it followed Epic's path on Project Hug. Like Epic, Match alleged that Project Hug was an effort "to pay hundreds of millions of dollars to key app developers to deter them from offering their apps via distribution channels outside Google Play[,]" and "Google had reached deals with most of the developers it targeted." *Id.* ¶ 114; *see also id.* ¶ 120. Like Epic, Match also did not assert a Section 1 claim based on these alleged agreements. *See id.* ¶¶ 241-50.

With no Section 1 claim arising out of these agreements anywhere to be found in this litigation, the parties proceeded with fact discovery, which closed on September 22, 2022.

B. Epic's and Match's Proposed Amendments

After the close of fact discovery, on September 29, 2022, plaintiffs, including Epic and Match, filed a notice reminding the Court of a previously submitted proposed case schedule. MDL Dkt.336. Epic and Match stated at that time that they would "work towards the dates in the proposed schedule," but did not mention a forthcoming new effort to amend their complaints. *Id.* at 3. The *very next day*, September 30, 2022—ten months after the December 3, 2021 amendment deadline—Epic surprised Google with news that it imminently planned to amend its complaint again, this time to add new Section 1 claims directed solely at the Project Hug agreements, including a claim that, through Project Hug, Google committed a *per se* antitrust violation. Pomerantz Decl. ¶ 2. Google declined to consent to this belated and prejudicial amendment. *Id.* At the plaintiffs' request, the Court then entered the new schedule on October 5, 2022, reminding the parties that the deadline to amend pleadings was "Closed." MDL Dkt.338.

[2] At an August 4, 2022, hearing discussing Match's request to extend the schedule, the Court noted that Match knew about this litigation long before it chose to file a complaint: "You could have filed earlier. . . . it is not like you didn't know this was happening." MDL Dkt.318 at 52:8-9.

Epic proceeded with its plan, and hours before the filing of this Motion, Match indicated it would join the effort. Pomerantz Decl. ¶ 2.

Epic's and Match's proposed amendments substantially mirror each other. They allege that, through "Project Hug," Google "paid or otherwise induced" certain app developers to commit to release their titles on Google Play at least as soon as through other channels, and to ensure content and feature parity between apps released on Google Play and those distributed through other mobile app stores. *See* Epic PSAC ¶ 198; Match PFAC ¶ 273.[3] Even though they do not specifically allege an actual agreement between Google and any app developer involving a commitment not to open a competing app store, Epic and Match assert claims under Section 1 of the Sherman Act, including *per se* claims. In support of these claims, they assert that Google's intent was to thwart competition, and that the agreements had the effect of preventing the emergence of new app stores. Epic PSAC ¶¶ 198-201; Match PFAC ¶¶ 275-76. The complaints give special focus to agreements Google reached with Activision Blizzard and Riot Games, two of Google's major game developer partners (and Epic's competitors). *Id.*

III. ARGUMENT

A. Governing Legal Standards

Because Epic and Match seek to amend their complaint after the December 3, 2021, deadline to amend, their motions are governed in the first instance by Rule 16(b), which requires a showing of "good cause" to amend the scheduling order. Fed. R. Civ. P. 16(b); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992). If (and only if) they surmount Rule 16(b)'s hurdle, then they must also show that amendment is proper under Rule 15(a), which permits amendment only when "justice so requires," Fed. R. Civ. P. 15(a), and "is not to be granted automatically," *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990).

B. Plaintiffs Have Not Met Their Burden to Demonstrate Good Cause

Under Rule 16(b), Plaintiffs have the burden to demonstrate good cause, which is "*more stringent*" than the standard under Rule 15(a). *AmerisourceBergen Corp. v. Dialysist W., Inc.*,

[3] "Epic PSAC" refers to Epic's Proposed Second Amended Complaint (MDL Dkt.344, Ex. A). "Match PFAC" refers to Match's Proposed First Amended Complaint (MDL Dkt.344, Ex. K).

465 F.3d 946, 952 (9th Cir. 2006). Specifically, they must demonstrate that they were diligent in pursuing amendment. *See Therasense, Inc. v. Becton, Dickinson & Co.*, No. C04-02123 MJJ, 2007 WL 4104099, at *2 (N.D. Cal. Nov. 16, 2007). If they cannot, the inquiry ends there and leave to amend should be denied. *Johnson*, 975 F.2d at 609. Prejudice can also serve as an additional reason to deny the motion. *Id.*

1. Epic and Match Fail to Meet Their Burden to Demonstrate Diligence

Plaintiffs cannot credibly argue that they were diligent in seeking amendment given the allegations regarding Project Hug in Epic's July 2021 First Amended Complaint. *See*, *supra*, at 3 (referring to "secret deals . . . in order to prevent these developers from competing"). In fact, the same day its amended complaint became public, Epic's CEO, Tim Sweeney, tweeted that Google had a "secret 'Project Hug' ***to pay off publishers to not compete with Google Play***," Pomerantz Decl., Ex. A (emphasis added). Epic could plainly have chosen to assert a Section 1 claim based on the facts it pleaded and knew about at that time in *July 2021*, yet it chose, instead, to wait until after the close of discovery in *September 2022*. This alone is sufficient to deny the motion.

Nor can Plaintiffs plausibly assert that their new allegations are justified by recently obtained evidence. As an initial matter, while Plaintiffs provide a general description of documents and testimony they obtained through discovery regarding Project Hug, they do not provide any explanation whatsoever for why *those documents or testimony* were necessary for them to amend. *See Eberhard v. Cal. Highway Patrol*, No. 14-cv-01910-JD, 2015 WL 4735213, at *2 (N.D. Cal. Aug. 10, 2015) (Donato, J.) (rejecting amendment in light of additional discovery where "the essential facts" were previously known to the moving party).

In fact, the bulk of the documents and testimony referenced in Plaintiffs' proposed amended complaints and in the Motion were produced many months ago. With respect to documents, the internal Google "email" cited in the proposed amendments, Epic PSAC ¶ 199, Match PFAC ¶ 274, was produced by Google *ten months ago*. Pomerantz Decl. ¶ 4. Nearly 30,000 documents related to Project Hug and approximately 37,000 documents referencing the developers identified in the motions—Activision, Riot, and Supercell—were produced before the December 3, 2021, amendment deadline. *Id.* With respect to testimony, the deposition of

Lawrence Koh, on which Epic and Match heavily rely, Mot. 3, was likewise taken *ten months ago*. *Id.* Another Google witness, Michael Marchak, also testified extensively about Google's Project Hug incentive deals with developers in response to Plaintiffs' focused questioning, including testifying about communications with Activision and Riot regarding potentially developing their own app stores, at his deposition *nine months ago*. Pomerantz Decl., Ex. C. And Epic made the same allegations that it now says support a Section 1 claim in its preliminary injunction motion filed *five months* ago, in which Epic accused Google of "paying off top app developers," including Activision, "to stop them from developing and launching competing Android app stores." MDL Dkt.213 at 9.

Motions to amend are routinely denied as dilatory when the moving party waits far less time than Epic and Match did after obtaining evidence. *E.g.*, *Amcor Flexibles Inc v. Fresh Express Inc*., No. C 14-01025 LB, 2015 WL 890360, at *1 (N.D. Cal. Mar. 2, 2015) (waiting 49 days to seek amendment after learning of new facts showed lack of diligence); *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc*., No. 10-cv-5591-SC, 2012 WL 6095089, at *1, 3 (N.D. Cal. Dec. 7, 2012) (waiting nearly two months showed lack of diligence); *Par Pharm., Inc. v. Takeda Pharm. Co.*, No. 5:13-cv-01927-LHK-PSG, 2014 WL 3704819, at *2 (N.D. Cal. July 23, 2014) (four months was not diligent); *EPIS, Inc. v. Fid. & Guar. Life Ins. Co*., 156 F. Supp. 2d 1116, 1133 (N.D. Cal. 2001) (three months was not diligent).[4]

Indeed, the substance of the deposition testimony cited by Plaintiffs confirms that they learned nothing new from these depositions. Activision's CFO Armin Zerza and Google employee Purnima Kochikar both testified that Google and Activision *never* entered into an agreement that Activision would not open its own app store. *See* Pomerantz Decl., Ex. D (Zerza Dep.) at 209:14-22; Zaken Decl., Ex. I (Kochikar Dep) at 139:15-23. Indeed, the "pertinent

[4] Match joined the case in May 2022, but their complaint demonstrates the same knowledge of these facts, they had complete access to Epic's FAC by August 2021, and they received access to Google's entire discovery record after joining the case. Pomerantz Decl. ¶ 3. Match also made a tactical choice to wait on the sidelines of this litigation, while pressing the same antitrust theories behind the scenes with state enforcers since at least before Epic filed its August 2020 complaint. *See* Pomerantz Decl., Ex. B. The Court has recognized that same point. MDL Dkt.318 at 52:8-9 (Court: "You could have filed earlier. . . . it is not like you didn't know this was happening.").

deposition testimony" (Mot. 12) Plaintiffs use to defend their delay consists almost entirely of the witnesses confirming the verbiage of emails that Google produced months ago. There is nothing in that testimony that resembles "new" information necessary to support a Section 1 claim.

In any event, an amending party cannot wait to "confirm" their claim through discovery—despite having all the facts to be on reasonable notice of it—before amending its pleading. The plaintiff must *first* assert its claims to put the defendant on notice; *then* the parties take discovery on those claims, that is how litigation works. Were it otherwise, complex litigation would be unmanageable, and trial by surprise based on post-discovery amendments would be commonplace. *Therasense v. Beckton, Dickinson & Co.* confirms this precise point. There, the court denied amendment on diligence grounds, faulting the moving party for waiting to seek amendment until it had developed "proof" of its proposed new claim. *Therasense*, 2007 WL 4104099, at *2. Acknowledging that depositions could make a party more "convinced of the strength of their [new] allegation," the court held that the obligation to amend was triggered sooner, once the party "had a basis to reasonably suspect" that it had a claim. *Id.* at *2-3.[5] Epic and Match have therefore failed to carry their burden to show diligence.

2. Allowing Amendment Would Severely Prejudice Google

Allowing Plaintiffs to assert their Section 1 claims now, after the close of fact discovery and in the midst of expert discovery, would also severely prejudice Google. Adding Section 1 claims based specifically on Project Hug—including a *per se* claim—introduces a fundamentally new theory of liability that Google had no reason to foresee.

In each of their prior complaints, Epic and Match pleaded their Project Hug allegations exclusively in support of their Section 2 monopoly-maintenance claims. *See* Epic FAC ¶ 33; Match Compl. ¶¶ 114, 120. Epic's preliminary-injunction motion underscored that Section 2 focus. MDL Dkt.213 at 9 (describing Google's "Project Hug" initiative as an effort to

[5] Contrary to Epic's and Match's suggestion, Mot. 11, *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, No. 16-CV-01393-JST, 2017 WL 3149297 (N.D. Cal. July 25, 2017) does not say otherwise. In *Oracle*, the court found that waiting to amend was not a lack of diligence specifically because the court had previously dismissed a portion of Oracle's complaint and ordered subsequent "test" discovery. *Id.* at *2. That circumstance is not remotely analogous here.

"unlawfully protect[] its monopoly"). Specifically, they claimed that the Project Hug efforts were *one aspect* of a mélange of conduct that Google undertook to support its alleged monopoly.

Those Section 2 claims, including with respect to Project Hug, are subject to the rule of reason. *FTC v. Qualcomm Inc.*, 969 F.3d 974, 990-91 (9th Cir. 2020). Under the rule of reason, the defendant may proffer procompetitive justifications for its conduct, *see id.* at 991, and the factfinder "weighs all of the circumstances of a case," including but not limited to "market power," "specific information about the relevant business," and an alleged restraint's "history, nature, and effect." *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885-86 (2007). The litigation battleground for these claims therefore turned on market definition, Google's alleged monopoly power, the alleged anticompetitive effects of these efforts in light of Google's other alleged conduct, the procompetitive effects, and Google's business justifications.

Plaintiffs' new Section 1 claims—in particular their suggestion that the Project Hug agreements included tacit agreements not to compete that are unlawful *per se*—fundamentally transform the role that Google's Project Hug efforts have in the litigation and at trial. "Resort to per se rules" is confined to a narrow category of agreements, such as price fixing and market division, "that would always or almost always tend to restrict competition and decrease output." *Leegin*, 551 U.S. at 886. Where it applies, the *per se* rule "eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work." *Id.* In the context of this case, Plaintiffs' proposed new Section 1 claims shift the litigation battleground from the rule-of-reason inquiry to the very different question whether Google's Project Hug agreements also included tacit agreements not to compete. The discovery focus likewise shifts to whether there is any direct or circumstantial evidence of such an agreement. *See In re Citric Acid Litig.*, 191 F.3d 1090, 1093 (9th Cir. 1999). For example, and in particular because Plaintiffs allege unwritten "secret" agreements not to compete, discovery into whether Google's developer customers had independent reasons not to open their own app stores becomes significant.[6]

[6] Plaintiffs deposed Activision about numerous issues, but, based on the Section 2 claims existing at that time, Google asked under an hour of questions. Pomerantz Decl. ¶ 5. Had Google known that Plaintiffs were pursuing a *per se* claim that Google had reached a tacit agreement with Activision, Google would surely have elicited detailed testimony going to that issue.

Google approached fact discovery regarding Project Hug based on the Section 2 cause of action that the plaintiffs intentionally chose to assert, not the claims they seek to add now. After all, the "plaintiff is the master of its complaint," *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1037–38 (N.D. Cal. 2013), and in antitrust cases especially, the defendant can only prepare its case according to the antitrust theory that the plaintiff actually chooses to plead. *See Bay Area Surgical Mgmt. LLC v. Aetna Life Ins. Co.*, 166 F. Supp. 3d 988, 994 (N.D. Cal. 2015) (emphasizing that in antitrust cases the plaintiff "must abide by the consequences of its pleading decision and cannot, at its convenience, switch to a theory not plead[ed] in the Complaint").

Because Google understood that Epic and Match chose to assert only a Section 2 claim based on Google's alleged Project Hug efforts, Google did not, and had no reason to, conduct the kind of discovery that is usually pursued in connection with Section 1 claims, particularly *per se* claims. Critically, had Google known that Plaintiffs intended to pursue these Section 1 claims, Google could have sought discovery from each of the counterparties to these allegedly unlawful agreements to have them confirm to the jury, in their own words, that there was *no agreement* to not compete. Google could also have sought discovery from the pertinent app developers regarding numerous issues, including their independent reasons for not embarking on the difficult and expensive project of opening their own app stores. The new Section 1 claims implicate these counterparties as alleged co-conspirators, and their testimony refuting these claims is obviously important. But by strategically waiting until discovery has closed, Plaintiffs have ensured that evidence cannot be developed. While that evidence was not necessary to defend against Plaintiffs' Section 2 claims, it would rebut the gravamen of Plaintiffs' new Section 1 claims.

In addition, Google would need discovery regarding precisely *who* Plaintiffs allege were party to these purported agreements not to compete. To be sure, the proposed amendments mention Activision and Riot, but they also claim Google had additional "agreements"—not limited to Project Hug agreements—with "at least" two dozen unnamed developers. Epic PSAC ¶¶ 198, 208; Match PFAC ¶¶ 273, 283. If Plaintiffs had amended earlier, Google could have used the discovery process to require Plaintiffs to sharpen their allegations and identify precisely which agreements they allege to be unlawful, which ones are *per se* unlawful, and which parties entered

those agreements. At this point, expecting Google to defend allegedly unlawful agreements, without an opportunity to determine who the alleged counterparties are, what specific agreements are at issue, and what about each of these purported agreements is allegedly unlawful, would be severely prejudicial and fundamentally at odds with the principle against trial by ambush.[7]

3. Additional Discovery Would Threaten the Existing Case Schedule

Additional discovery at this late date would jeopardize the Court's carefully crafted case schedule. Merely two weeks ago, the Court entered a revised scheduling order, after the parties worked laboriously on a mutually agreeable schedule that met the Court's guidelines. MDL Dkt.338. Throughout those efforts, neither Epic nor Match advised either the Court or Google that it intended to file a motion to amend that would add new claims and new theories of liability. As it stands, the schedule is already compressed, with only three weeks to take all expert depositions after rebuttal reports, and a few days after that to file *Daubert* and dispositive motions. *Id.* The time it would take to obtain discovery now from Epic and Match clarifying the scope of their new claims, and then documents and depositions from third parties to show why those claims are baseless, would wreck this schedule and jeopardize court deadlines, including the trial date. Indeed, expert discovery is well underway, with Plaintiffs' opening reports having been served, and Google's reports due November 18. The train is in motion and proceeding on track, but permitting amendment with discovery would surely derail it. Courts routinely deny leave in order to preserve the case schedule. *E.g.*, *Solomon v. N. Am. Life & Cas. Ins. Co.*, 151 F.3d 1132, 1139 (9th Cir. 1998); *Singh v. City of Oakland,* 295 F. App'x 118, 122 (9th Cir. 2008); *Therasense*, 2007 WL 4104099, at *3. This Court should do the same.

C. Amendment Is Not Warranted Because It Would Be Futile

Even if Epic and Match could satisfy Rule 16(b), they would also have to satisfy Rule 15(a). In applying Rule 15(a), courts consider "bad faith, undue delay, prejudice to the opposing party, futility of the amendment, and whether the party has previously amended his pleadings." *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). The unjustified delay and prejudice to

[7] Plaintiffs' belated amendment would also prejudice Google with respect to expert discovery. Google's expert reports are due November 18, 2022, shortly after this motion will be heard.

Google are already apparent, *see supra*, at 5-11, and warrant denying leave to amend under Rule 15. In addition, the new *per se* claim is futile and should be rejected.

"Futility of amendment can, by itself, justify the denial of a motion for leave to amend." *Bonin*, 59 F.3d at 845. Even a part of an amendment (e.g., a single count of multiple) can be denied on futility grounds. *E.g.*, *Guerrero v. Cnty. of Alameda*, No. C 18-02379 WHA, 2018 WL 4680183, at *1 (N.D. Cal. Sept. 28, 2018). "[T]he same standard of legal sufficiency" under Rule 12(b)(6) applies to arguments that a proposed amendment is futile. *Stonebrae, L.P. v. Toll Bros.*, No. C-08-0221 EMC, 2010 WL 114010, at *1 (N.D. Cal. Jan. 7, 2010).

Applying that standard, courts routinely dismiss *per se* claims at the pleading stage when *per se* treatment is not legally warranted. *See, e.g.*, *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 61 (1st Cir. 2004); *NSS Labs, Inc. v. Symantec Corp.*, No. 18-cv-05711-BLF, 2019 WL 3804679, at *8 (N.D. Cal. Aug. 13, 2019); *cf. In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d 1003, 1010 (N.D. Cal. 2008) ("the decision of what mode of analysis to apply—per se, rule of reason, or otherwise—is entirely a question of law for the Court"). Here, Plaintiffs' proposed *per se* claim fails as a matter of law because (1) the complaints do not plausibly plead a horizontal agreement not to compete, and (2) the alleged agreements are inappropriate for *per se* treatment as a matter of law.

1. Plaintiffs Fail to Plead a Horizontal Agreement Not to Compete

Plaintiff's proposed *per se* claim fails for the simple fact that it does not allege an actual horizontal agreement not to compete.

Per se treatment is reserved for horizontal agreements, *i.e.*, those between competitors. *See In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1191-92 (9th Cir. 2015). To survive, therefore, the complaint must allege an agreement between Google and an actual or potential competitor. And the alleged agreement itself must reflect an actual "meeting of the minds" on how the horizontal competitors will act, not just an allegation of parallel conduct. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007). That agreement can be established by direct or circumstantial evidence. *See, e.g.*, *In re Citric Acid Litig.*, 191 F.3d at 1093.

Plaintiffs do not plead any direct evidence of a meeting of the minds. *Frost v. LG Elecs.,*

Inc., 801 F. App'x 496, 497 (9th Cir. 2020) (direct evidence requires no inference to be made). They make conclusory (and thus insufficient) assertions "that some of these agreements were horizontal agreements," Epic PSAC ¶ 198, Match PFAC ¶ 273, and allege there are *vertical* agreements between Google and its developer customers regarding the terms on which developers would distribute through the Google Play store, *see, e.g.*, Epic PSAC ¶¶ 199-200. But there is no allegation of direct evidence of a promise not to open a competing app store.

All that is left are circumstantial allegations focusing on *Google's* purported intentions. Epic PSAC ¶ 200 (referring to Google's "understanding" and "intention"); Match PFAC ¶¶ 273-77. The "understanding" of one party, however, about the effect of an agreement is by definition not a meeting of the minds as *Twombly* requires, or a reciprocal "conscious commitment to a common scheme designed to achieve an unlawful objective," *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (quotation omitted). Among other things, Project Hug represents procompetitive price-cutting by Google to attract important customers, *see supra*, at 1, and "cutting prices in order to increase business often is the very essence of competition." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986); *accord Name.Space, Inc. v. Internet Corp. for Assigned Names & Nos.*, 795 F.3d 1124, 1130 (9th Cir. 2015). Thus, as another court recently explained in granting a motion to dismiss after refusing to infer a horizontal agreement:

> Google's actions are consistent with a firm seeking to secure the business of a very large potential customer by offering it favorable terms. . . . [This] undoubtedly had the effect of diverting business from a competing service, but this does not convert the agreement into an unreasonable restraint of trade.

In re Google Digital Advert. Antitrust Litig., No. 21-cv-6841, 2022 WL 4226932, at *14 (S.D.N.Y. Sept. 13, 2022).

Indeed, if the proposed complaints sufficed to plead a horizontal agreement not to compete, then countless businesses violate the Sherman Act when they decide to buy rather than build their own, or to outsource rather than insource. Epic's own game store, for example, boasts exclusivity deals with game developers, but surely Epic does not think that practice is *per se*

unlawful. *See* Epic Games, *Frequently Asked Questions*, https://www.epicgames.com/site/en-US/epic-games-store-faq (last updated Aug. 18, 2021). The practical reality is that these decisions may result in fewer potential competitors, and the suppliers may well offer their best deals to customers whose defection threatens them most. That is the competitive process at work, not horizontal conspiracy, and Plaintiffs' allegations amount to nothing more than that.

2. *Per Se* Treatment Is Unavailable Here As a Matter of Antitrust Law

The rule of reason "is the presumptive or default standard," *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1133 (9th Cir. 2011) (quotations marks omitted), while "*[p]er se* liability is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality," *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (quotations marks omitted). "[T]he per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." *Leegin*, 551 U.S. at 886-87 (citation omitted). *Per se* treatment, therefore, is particularly unsuited to "novel business practices—*especially* in technology markets." *Qualcomm Inc.*, 969 F.3d at 990-91 (quotation omitted). These principles point to two reasons to reject *per se* treatment.

First, Plaintiffs describe the Project Hug agreements as principally vertical, defining the terms on which Google would provide a service to their developer customers. *E.g.*, Epic PSAC ¶ 198; Match PFAC ¶ 273. Non-exclusive vertical agreements—with discounts, no less—are so likely to be pro-competitive that they are effectively judged by "rules of per se legality." *Schor v. Abbott Lab'ys*, 457 F.3d 608, 613 (7th Cir. 2006) (Easterbrook, J.). At best, Plaintiffs allege *hybrid* agreements with vertical and horizontal aspects. But hybrid arrangements are not subject to *per se* condemnation as a matter of law. For example, in *Frame-Wilson v. Amazon.com*, Inc., No. 2:20-cv-00424-RAJ, 2022 WL 741878, at *7 (W.D. Wash. Mar. 11, 2022), which granted a motion to dismiss a *per se* claim involving Amazon and its third-party sellers, the court held that even if "the [predominantly vertical] agreements between Amazon and third-party sellers [using Amazon's platform] contained a horizontal element, such a 'hybrid arrangement' would be analyzed under the rule of reason." *Id.* at *6 (citing *Dimidowich v. Bell & Howell*, 803 F.2d

1473, 1481 (9th Cir. 1986), for the proposition that "under the Sherman Act, rule of reason analysis would be appropriate for the 'hybrid' conspiracy"); *cf. Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1354-57 (9th Cir. 1982) (refusing per se treatment for horizontal market allocation agreement between franchisor, which also sold through its own outlets, and franchisees). Likewise, in *Google Digital Advertising*, the court concluded "that th[e] hybrid relationship between Google and Facebook [under which Google provided incentives for Facebook to participate in Google's ad auctions] is predominantly vertical and properly scrutinized under the rule of reason." 2022 WL 4226932, at *16.

Second, this alleged restraint is the polar opposite of one with which "courts have had considerable experience" and "can predict with confidence that it would be invalidated in all or almost all instances." *Leegin*, 551 U.S. at 886-87. The nature of app distribution is exactly the sort of "technology market[]," and Project Hug the sort of "novel business practices," that preclude *per se* treatment. *Qualcomm*, 969 F.3d at 990-91; *see Google Digital Advert.*, 2022 WL 4226932, at *16 (holding per se treatment especially inappropriate "[i]n a novel marketplace with rapidly changing technology that can alter the nature of relationships between market participants"). Consider just one complication absent from garden-variety market-division cases receiving *per se* treatment: Both the Google Play store and the app stores that other developers might launch would be two-sided platforms. Because *per se* claims generally do not require defining a relevant market, *see Gough v. Rossmoor Corp.*, 585 F.2d 381, 385 (9th Cir. 1978), Plaintiffs would have this case proceed without considering the effects of these agreements on users *and* developers, or indeed without any inquiry into markets at all. That impoverished mode of analysis would contradict the Supreme Court's instructions that "evaluating both sides of a two-sided transaction platform is . . . necessary to accurately assess competition" and thus "courts must include both sides of the platform" in defining a relevant market. *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2286, 2287 (2018).

Plaintiffs' *per se* theory is legally unsound and amending to add it would thus be futile.

IV. CONCLUSION

Google respectfully requests that the Court deny the motion for leave to amend.

DATED: October 21, 2022

Respectfully submitted,

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I, Glenn D. Pomerantz, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(h)(3), I hereby attest that counsel for Defendants have concurred in this filing.

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